Annual Report
Information Commissioner
1990-1991

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"The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exemptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government."

Subsection 2(1)
Access to Information Act

The Honourable Guy Charbonneau
The Speaker
Senate
Ottawa, Ontario

June 19, 1991

Dear Mr. Charbonneau:

I have the honour to submit my annual report to Parliament.

This report covers the period from April 1, 1990 to March 31, 1991.

Yours sincerely,

John W. Grace

The Honourable John A. Fraser, PC, QC, MP
The Speaker
House of Commons
Ottawa, Ontario

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Mandate

Freedom of information: The citizen's right to know -- or the government's right to "no"?

The Information Commissioner is a special ombudsman appointed by Parliament to investigate complaints that the government has denied access to its information. Such complaints are made under the *Access to Information Act* — Canada's freedom of information legislation.

Passage of the Act in 1983 gave Canadians the broad legal right to information recorded in any form and controlled by most federal government agencies.

The Act provides government institutions with 30 days to respond to access requests. Extended time may be claimed if there are many records to examine, other government agencies to be consulted or third parties to be notified. However, the requester must be notified of these extensions within the initial timeframe.

Of course, access rights are not absolute. They are subject to specific and limited exemptions, balancing freedom of information against individual privacy, commercial confidentiality, national security and the frank communications needed for effective policy-making.

Such exemptions permit government agencies to withhold material often prompting disputes between applicants and departments. Dissatisfied applicants may turn to the Information Commissioner who investigates applicants' complaints that:

- they have been denied requested information;
- they have been asked to pay too much for copied information;
- the department's extension of more than 30 days to provide information is unreasonable;
- the material was not in the official language of choice or the time for translation was unreasonable;
- they have a problem with the *Info Source* guide or periodic bulletins which are issued to help the public under the Act;
- they have run into any other problem using the Act.

The commissioner's investigators may examine any record except Cabinet documents.

His independent status and power of review are strong incentives to government institutions to adhere to the Act and respect applicants' rights.

Since he is an ombudsman, the commissioner may not, however, order a complaint resolved in a particular way. Thus he relies on persuasion to solve disputes, asking for a Federal Court review only if he believes an individual has been improperly denied access.

New Kid On The Block

A new commissioner has the luxury of building upon the past, of stepping back, taking a deep breath and trying new beginnings. He also has to do some fast talking: to Parliament whose servant he is, to the public to earn its confidence and, yes, even to the government in the hope of a good start to an always delicate, sometimes uneasy relationship.

A first report, especially one coming after only nine months in office, should also demonstrate a prudent tentativeness, if not that unfashionable virtue, humility. No ferocious judgments in this one, no hectoring, no claims to offer all the answers. Asking the right questions is challenge enough.

Add to all this the duty of this new Information Commissioner to explain a seven-year shady past as Privacy Commissioner. Can this man be trusted to be a champion of openness?

Yes, there is some talking to do.

First, the leopard changing his spots: a professional privacy defender turning professional advocate for open government without a decent laundering period.

The two positions are, in fact, much more complementary than adversarial. In both Quebec and Ontario, the same persons function simultaneously as privacy and information commissioners. So far there have been no visible signs of professional schizophrenia.

The *Access to Information Act* and *Privacy Act* are indispensable partners for achieving a common goal of open government. A privacy commissioner, as much as an information commissioner, should be a vigorous advocate of the right of access to government records.

Both commissioners are ombudsmen; both investigate complaints on behalf of individuals (corporations may also make requests under the *Access to Information Act*) seeking their full rights of access, either to their own records (privacy) or to non-personal records (access to information). Section 19 of the *Access to Information Act* recognizes privacy as an important human value by requiring the exemption of personal information from any disclosures made under the Act. The *Privacy Act*'s definition of personal information is also that of the *Access to Information Act*.

The Information Commissioner and the Privacy Commissioner are advocates of the legislation itself, not of the special interest of either an individual or the government. Each commissioner has the duty to balance values which may sometimes be in conflict. When the balance is right, then the legislation is the winner. Having been long sensitized to one of the values may even be a qualification for the other job.

The first Access to Information Commissioner had been a privacy commissioner (under the *Canadian Human Rights Act*). That experience did not make Inger Hansen soft. Her indelible mark was of fierce independence. She was the pioneer who had to face the first waves of resistance to something new, something uncomfortable for some and, yes, something even threatening to others. She faced it without flinching and her successor is grateful for the stamp of integrity she placed upon the office.

In many ways, openness in government was -- and in many places still is -- an alien culture. It was certainly not found in the British public service in which are grounded so many Canadian government

practices. To the Canadian public servant, government information was almost a state secret unless specifically designated otherwise. There seemed in that to be prudence, even wisdom. It didn't hurt, of course, that being privy to state secrets, great or small, conferred an aura of authority, and at least the illusion of power. Who would fight those perceptions?

Aren't the Americans entirely too open in their ways of governance? And the Swedes! Aren't they utterly mad with their upside-down, back-to-front notion that all government information is public apart from a few narrow exceptions set out in the country's constitution? (For this reason, the Swedes do not think it necessary to have an access to information act.)

In Scandinavian countries, one need only ask in order to know what anyone has paid -- or has not paid -- in income taxes. Try selling such a seditious concept in Canada! (Yet a visit to a provincial registry office or city hall may be all that is required to know a neighbour's municipal taxes. Such are the vagaries of convention in these matters.)

Inger Hansen faced passive -- and sometimes not so passive -- resistance as the herald of a new era of open government -- resistance still lingering in not so out-of-the way places. She was not always welcome at the party, but to her credit, she really didn't care. She never gave up. Her pioneering efforts have had enduring impact upon the Information Commissioner's office and upon government.

This previous commissioner's regular cries from the heart were anguished testimony, if such be needed, that old ways die hard. But noting the frustrations of Canada's first Information Commissioner is to call attention to the fact that the *Access to Information Act* is still young. Seven years into an act is a short period in the life of a law and a nation; too short to expect this legislation to transform completely old and embedded ways.

Parliament, the country and, especially, the frustrated users of the act should not despair about its effectiveness. To call it, as some critics do, "primarily a secrecy act" is being merely cynical, glib -- and wrong. It was simply naive to expect that a spirit of openness would descend, like the Holy Ghost, on government upon the proclamation of an access to information law.

Ged Baldwin, the Member of Parliament from Peace River who made access to information a private member's personal crusade, was idealistic about the change which would occur under the legislation. Perhaps we all expected too much too soon. The apparatus of government is intractable and defensive. And this legislation has more potential than any law on the books to harass, embarrass, distract and annoy the government of the day (and please the opposition).

Some politicians and public servants continue to resent requests for information which they would call trivial and vexatious. And perhaps some are. Knowing how much a cabinet minister spent on hotel bills and meals doesn't really advance public policy. Granted. Many more important questions can be put -- and are. But the fact that in the great scheme of things questions are asked which may seem petty does keep ministers -- and all who spend public money -- at least a little more conscious of thrift as a political virtue.

No, the *Access to Information Act* has not realized a new era of public participation in the formation of public policy which some of the legislation's advocates earnestly anticipated. Government as an institution is still often dense, at best opaque, rarely transparent. The old culture of closeness lingers on. There is no hiding that.

Closed government ways, no matter what government, were simply too deeply encrusted for sudden

transformations. Changes will be incremental, the speed depending upon the collective self-confidence level of government ministers -- and governmental self-confidence is usually in short supply.

But remember, "Yes, Minister". Senior public servants also play an enormously important role in the success or failure of legislation which to them is often meddling and troublesome. It may require a generation of new managers before full institutional comfort is taken with access legislation. The good news is that deputy minister after deputy minister has pledged support to the new commissioner for the principles of the Act and for making it work better. One wants to believe.

What's going on?

Access to information legislation is not founded on abstruse political science theories or philosophical concepts. Its justification is at once disarmingly simple and profound. "The public should be able to know what the government is up to" was the way U.S. Senator Patrick Leahy of Vermont put it with fine New England sparseness. That's why the legislation is so tough on our rulers, often far tougher than Question Period in the House of Commons where evasion can be easy.

To know what the government is up to is essential to the health of democratic process. To have a chance of knowing what the government is up to requires a right of access to the records and documents which government produces (with taxpayers' money) and which form the basis of government decisions or in decisions.

That will sometimes embarrass record keepers. But a free flow of basic information to the public is vital to a democracy, to informed participation in decision-making and to public evaluation of the decision-makers. "The question" Bruce Hutchison wrote many years ago after a judge had banned journalists from his courtroom, "is whether the people are to be trusted."

Justification for access laws can go even deeper. The great publisher of the New York Times, Arthur Hays Sulzberger, once said (his language today might be called sexist) that "a man's judgment cannot be better than the information on which he has based it." Obvious enough. What may not be so obvious is the profundity of Sulzberger's conclusion:

> "Give him the truth and he may still go wrong when he has the chance to be right; but give him no news or present him only with distorted and incomplete data...and you destroy his whole reasoning process and make him something less than a man."

Less than a man -- or less than a woman! The stakes in the access to information business are high.

Public recourse to access laws can only grow -- for this reason: issues are becoming more complex at precisely the same moment that confidence in politics and politicians is falling. Whatever else such a disturbing confluence may bode, it means inevitably a greater demand for basic data of government.

For example, environmentalists will want every government environmental study they can get their hands on and there will be outrage at real or perceived stonewalling. Interest groups fighting spending cuts will ask for all the documents they can think of to help them make an opposing case. Public health and public-safety information will be increasingly sought in the coming years. This is not an age of faith or trust. People want to see the facts for themselves.

According to the Treasury Board, which keeps the statistics, in the last reported 12-month period

(1989-90), 10,234 access requests were made to federal government institutions, up from 8,853 in the previous year. A ten per cent increase is anticipated for the current year: more and more people want the facts.

Who are these people? Media numbers are lower than one might have expected -- comprising only 8.4 per cent of total requests. Business requests represent 54.6 per cent, organizations 6.2 and academics 2.4. Requests from individuals comprise 27.1 per cent. The category of 1.3 per cent of requesters is not known. Yes, the Act is being used -- and more knowingly used each year as requesters become familiar with the labyrinthine ways of government record-keeping.

The delaying game

Let the evidence show that the *Access to Information Act* is not user-friendly. Delays in responding to requests for information have been particularly frustrating, much too frequent and much too long. It is especially disappointing for a new commissioner to report that in the past year delays became more common. This year, the number of delay complaints investigated by the commissioner was 232 -- 98 more than the previous year.

In some institutions, notably Finance, Environment and, more recently, National Defence, delays have been chronic. Some slippage because of the Gulf War may be justified in a few departments. But there will be no general absolution. An unjustifiable delay is a refusal to give information, a denial of a right, a breach of the law and that is simply unacceptable.

Mr. Justice F.C. Muldoon's strictures last year against excessive delays should have more impact than the mere pleadings of an information commissioner who possesses no powers to compel. In a case brought by the previous commissioner against the Secretary of State for External Affairs to the Federal Court, Mr. Justice Muldoon said he was "quite conscious that responding to...requests is truly 'extra work' which is extraneous to the line responsibilities and the very *raison d'être* of government departments...But when, as in the *Access to Information Act*, Parliament lays down these pertinent additional responsibilities, then one must comply."

The court declared that its review of the case was not merely aimed at the one respondent but "to let all the other potential respondents know where they stand in these matters". Mr. Justice Muldoon could not have been clearer about where he stood.

"It cannot be doubted", he wrote, "that one principal purpose of the Act is to force a change of public servants' habitual, ingrained reluctance to give out the government's information, even apart from the obvious, related limitations on access."

Delay is a parasitic, bureaucratic disease, not just a sniffle and a sneeze, which is easily caught, even by the attending physician. The ombudsman of Bophuthatswana, of all places, used that vivid metaphor in a recent report. Delay respects no national boundaries. His point is valid. If unreasonable delays are deemed to be a denial of an individual's right of access to government information, an unreasonable delay by the information commissioner in making findings on complaints is a denial of a companion right.

Thus, an intensive effort is under way to reduce significantly the time taken to complete complaint investigations and to make findings. No brave promises will be made or an arbitrary timetable imposed. The commissioner's performance is as much controlled by the responsiveness of an institution as by the vigour of his own efforts. Moreover, a quick finding that a complaint is well-founded is often easy to

make.

What is harder, and slower, is negotiating a solution that meets the requirements of the law in balancing validly competing interests between a requester's right to information and interests represented by the Act's exemptions. All that being true, it must be said that cases have sometimes languished too long and the blame cannot always be placed elsewhere.

De-courting the process

Delays are only one of the impediments to an access paradise. As worrisome was the number of cases which the previous commissioner felt compelled to take to the Federal Court for review. At the end of her term, 18 cases were already in the court. Five of these had been argued and were awaiting decision. At least five more were headed there. The sheer number was objective evidence of something being profoundly wrong.

One of the important reasons for having a commissioner is to solve complaints without resorting to the courts. In the United States, persons who feel that their *Freedom of Information Act* rights have been violated have no alternative but to go to court for redress. There is no commissioner to complain to, no ombudsman to verify whether the law has been violated, no person to negotiate settlements. A complainant is on his or her own.

In Canada, not only is a commissioner- ombudsman available, the requester's road to the Federal Court must travel through the commissioner's office. Parliament wanted clearly to give mediation a chance. Turning to the Federal Court or threatening to take a case to court are acts of desperation. They are symptoms of the failure of mediation and the breakdown of the ombudsman's role which presumes good faith on both sides. There have been too many such failures.

The courts have an indispensable role in interpreting new and complex legislation. What has happened, however, is that the Federal Court (or the threat of it) became too routine a recourse -- the process too adversarial. And the threat of court action, too quickly made, interfered with the reasonable settlement of complaints. Clearly, that is an abuse of the intent, if not the letter, of the legislation.

A new commissioner is in no position to assess blame. But a new commissioner can say that his intention is to give sweet reason every chance, and to hope that government institutions are as interested as he is to effect reasonable solutions without the time and expense of litigation.

That would hardly be surprising. Canadian public servants are sworn to uphold the law. The law says that records are to be made public, subject only to specific exceptions. It would be simply unworthy of the traditions of the country's public servants to believe they are conspiring to thwart the law, irksome though it may sometimes be.

There is some good news to be reported from the legal front. Of 18 cases in or coming to court, 13 have been resolved. Work continues in hope of finding solutions to the rest and, since the appointment of a new commissioner, no new cases have been taken to the Federal Court.

But, let there be no misunderstanding: settlements will not be made at the expense of overriding anyone's basic legal rights created by the Act. That is not a settlement; that is surrender. The Information Commissioner will not hesitate to take on a court case when, in his view, rights are blatantly denied or when key points of law require decisions or mediation has been unsuccessful.

Negotiation -- the key

Government institutions and clients of the information commissioner's office are entitled to know how a new commissioner sees his job. So that there will be no double standards, what follows here is a message already conveyed to the office's staff and access to information coordinators.

The *Access to Information Act* and the *Privacy Act* are indispensable partners for achieving a common goal: open government. The commissioners should be above all strong advocates for the legislation itself. Sometimes a commissioner will come down on the side of an individual; other times he finds himself supporting the government. Either way, if work is done well, the conflicting values have been wisely balanced and the requirements of the Act will have been met.

The government and complainants should know that this office is sensitive to the competing claims which the *Access to Information Act* forces it to adjudicate. The first priority is to keep open and healthy lines of communication with complainants, with government departments and third parties. An ombudsman's office lives or dies on its success as a persuasive, reasonable communicator.

Being unable to make enforceable orders should never be seen as a weakness; it is a strength because the ombudsman's role is preserved. Negotiation and persuasion often succeed where an adversarial relationship fails. The power to compel compliance would inevitably mean confrontation and the ombudsman's office would be in great danger of being in a chronic state of war with government institutions.

An effective, professional working relationship with government institutions will be the key to the office's success, and thus the public's success. Success will not be measured by the number of court cases launched or won. It will be measured by satisfied users of the legislation, by fewer complaints to the commissioner's office or, better still, by progress in convincing government to release information informally, without application under the Act.

The following commitments were made to departments. They are now reaffirmed:

1. We will be ready to discuss cases and exemptions at the staff level to the full extent possible without compromising our ability to investigate complaints.

2. We will not do your work for you but we will emphasize cooperation, discussion and negotiations. We will not leave you guessing as to what remedial action will satisfy us.

3. The vigour with which complaints are investigated will be tempered by courteous respect for opposing points of view. Honourable disagreements should be expected when important competing values are contending. Good faith on both sides will be presumed .

4. There will be no surprises. No adverse findings or no notice of court action will go to ministers before senior officials have been consulted and every effort made to resolve the dispute.

5. We will make every effort to be consistent in our approach. Again, no surprises.

All of which is respectfully submitted in the hope of making discourse more civil, the courts less burdened and the lawyers less busy (and, perhaps, a little less wealthy).

This message has been taken directly to the top. The commissioner has personally asked ministers, deputy ministers, chiefs of staff and MPs for their support in making the legislation work. The reaction was unfailingly positive. The deputy minister of Employment and Immigration circulated a memorandum among his senior staff urging that on their side there be a response "in a similar fashion to the challenge of resolving complaints in an open, cooperative manner thereby avoiding ...lengthy argument and expensive litigation".

Often it's working

There are more reasons than declared good intentions and the successful settlement of court cases for restrained optimism. The evidence is now clear that the impact of the *Access to Information Act* is irreversible and visible across the breadth of the public service.

- Note the increasing frequency of news stories carrying the credit line "according to information released under the *Access to Information Act*".

- Ask lawyers who apply regularly to National Revenue Taxation. They will say that as a direct result of the Act, the department is more forthcoming in disclosing information without the need of formal applications. (That is not as if Revenue Canada Taxation is not also responding to formal requests. In its last *Access to Information Act* report, the department reveals that it disclosed more than 200,000 pages of information in answering 1,372 requests.)

- Ask applicants to Health and Welfare, Correctional Service Canada and, perhaps surprisingly, the Communications Security Establishment. After shaky starts, these departments have made significant improvements in their performance in responding to requests for records.

- Ask journalists who know their way around both the Act and access to information co-ordinators' offices and who report striking successes in obtaining information without hassles.

- Ask the professional "accessor" who offered the unsolicited testimonial that Supply and Services is unfailingly helpful in digging out information from out-of-the-way places.

Many more success stories go largely unreported because the information commissioner's office is in the business of accepting complaints, not compliments.

Another reason for encouragement is found in, of all places, the Public Service 2000 enterprise. From that exercise has come an almost revolutionary report entitled, "Service to the Public". It had the nerve to tell public service managers that effective service to their customers (the public) should come before the perpetuation of their institutions. How far can plain-speak go?

One of the things our customers want, of course, is easier access to government-held information, whether under the *Access to Information Act* or informally.

What follows is more from Public Service 2000, not the Access to Information Commissioner:

> "Our review of studies of public perception shows a continuing frustration with poor access to government information and services. "

The solution? Again, from Public Service 2000:

> "A client-centred approach is the essential base for systemic, significant improvement in access... Communication and information technologies are particularly important factors affecting access...It is vital to know whether information data bases relevant to client needs already exist, how they could be accessed and whether new ones should be developed."

The writer (the prose is too direct to have been produced by a committee) of these words may not have had the *Access to Information Act* specifically in mind. But if the words mean anything at all, they apply particularly and most pertinently to a law whose first word and essence is "access".

Thus, the new message from on high (and, one hopes, a recipe for success in the public service) is that answering to requests for information should not be a bother and irritant which hindered a public servant from getting on with his real job. In this new dispensation for the second millennium, giving the public information should be very much a public servant's real job.

The obvious corollary is that the entirely sensible principles of the *Access to Information Act* should be integral to the way a department does business, not something off to the side and, as often as can be managed, out of mind.

Despite some good news and expectations of better prospects ahead, there is no danger that either the commissioner or anyone else will be overcome by euphoria. The *Access to Information Act* remains a long way from achieving the goals of its founders, even allowing for excessive idealism. The challenge to make it work better remains daunting.

Eliminating the negative

Grant in a wild moment of whimsy a brave new access to information world a world where all the good intentions are realized: no delays, no silly exemptions and no unnecessary court cases. Yet, achieving that impossible dream would only be to eliminate the negative. The ultimate goal in the words of a song, deservedly long forgotten by all but the aged, is to "accentuate the positive".

For the *Access to Information Act* is about much more than complaints and disputes:

- It is about open government, the legislation being a broad, indispensable instrument for the primacy of openness.

- It is about easy public access to government records.

- It is a declaration of public information rights whose principles are that a free society must also be an open society, that public information is owned by the public, held in trust by government and, unless explicitly restricted by law, openly available to the public.

Who would dare to question such nice, even noble principles? Yet after seven years, the *Access to Information Act* is still too much seen as something to be served in the narrowest possible way.

In fact, the Act says just the opposite. Note the words set forth in the section of the legislation which describes its purposes: "to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available

to the public" and that "exceptions should be limited and specific".

Then the second paragraph, too often forgotten: "This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public".

The brave broad thrust of the legislation has been blunted by nitpicking, enervating disputes over scraps of records. The ultimate irony is that an access to information act is sometimes said to be an impediment to easy access. That piece of glibness is simply not true. What is true, however, is that access to information offices, including the Commissioner's, have been devoting too much energy to complaint handling.

There are better and bigger things to do in the access business in 1991 than, for example, to argue whether the results of government commissioned public opinion polls should be released. (It is passing bizarre that there should ever be argument over whether the public is entitled to know what its own opinions are, especially opinions collected at public expense.)

A better thing is to renew those first principles of access to information and to recapture some of the splendid idealism of the legislation's sponsors. Horizons should be lifted above the inescapable drudgery of searching old records.

Electronic info-access

Nothing should do that faster than discovering something of the new, enormous challenges of records management in the information age. A recent study prepared by the U.S. Department of Justice observed that the "information age" is quickly being overtaken in the 1990s by an "electronic information age".

One estimate has it that within the next decade, nearly 80 per cent of all public sector information will be automated and fully digital. Online databases, that is, computer-held information which can be electronically transferred from one computer to another, have expanded at a breathtaking rate. In 1980 the number of these databases worldwide was 400; at the end of 1990 there were 4,615. Sellers of online services have grown from 59 to 654 during the same period.

The money statistics are perhaps even more impressive. The authoritative study of the *Link Resources Corporation, Current situation and forecast of electronic industry in Europe and North America 1989-1994 (New York, LINK 1989)* reports: the total electronic information revenues in North America alone were $6.551 billion (U.S.) in 1988 and are forecast to reach $19.784 billion by 1994 -- tripling in six years !

The ubiquitous computer with its ability to store and connect an infinity of information holds the key either to giving access legislation a richness beyond anyone's dreams or making it a cruel, largely unrealized promise.

Computerization offers the possibility, as one report (*Federal Information in the Electronic Age, Bureau of National Affairs, Washington, DC*) says, of "figuratively breaking down the walls of public record rooms." The report puts it this way:

"Census figures, economic data, millions of patents, the inventory of hazardous chemicals in local

factories, consumer complaints about automobiles...No more waiting for mail from the federal documents centre...or wading through dusty files...You're the electronic citizen in an electronic world."

Whether the electronic age citizen benefits will depend upon the ability to penetrate electronic walls. Technology again runs ahead of policy. The time is now to begin addressing these new access to information issues seriously and systematically. In increasing numbers, a new generation of computer literates are acquiring -- at home or office -- the computers and the modems needed for online access. Theirs is clearly the way of the future.

At present, an alternative, less high-tech system for providing access to government-held electronic information, could be put in place. Here's a modest proposal for a pilot project:

A citizen could mail, fax or call (perhaps on a 1-800 number) in a search request to a central (or regional) search service. Searches would be done by qualified personnel with the necessary specialized equipment. The searcher could print out and mail the search results to the requester. In some cases, the searcher might even be able to give the information directly to the requester while he or she was still on the telephone. If the requester was connected to electronic mail, search results could be transmitted electronically to his or her electronic mailbox.

Here are some advantages of the proposal:

- An individual does not need special equipment or training.
- The searchers can ensure that their searches are done efficiently and not overloading government computers with inefficient search transactions.
- Security of government computers and databases is safeguarded.
- Searchers can operate within guidelines designed to prevent frivolous, wasteful, or impractical searches such as an insufficiently precise search leading to an unmanageable number of "hits". (For example, Environment Canada's AQUAREF database contains over 60,000 references relating to Canadian water resources. It would not make sense to search for all references containing the word "water": the number of "hits" would be too large.)
- The search service can be used to establish access needs and priorities: for example, the most popular search subjects and the most common types of search. This information can be useful in determining which databases the public most needs to access.
- The search service can itself build a database of most frequently requested information. This database can gradually become the database of first resort, simplifying and speeding the search process.

Some cautions:

- Unrealistic expectations should not be raised. Some of us either have no desire to be "electronic citizens" (futurists tend to be enthusiasts) or are techno-peasants, a long way from having ready access to online databases or databases distributed in electronic form.
- The provision of wide access to government computer and online databases costs money and

poses security problems.

- Charging realistic fees for access requests could restrict access to those who can pay. Yet failure to charge for services may be unfair to non-users and frequently leads to wasteful or inefficient use of the services.

- In many cases the private sector may be in a better position than government departments or agencies to provide wide distribution of government-held information. Here again, however, private sector charges for products and services may be beyond the means of most citizens.

And there will be resistance. Institutions may argue that they should not be required to take extraordinary measures to fulfil their responsibilities under the *Access to Information Act*. Departments will say that their primary business is not, after all, to serve researchers, economic consultants or newsletter writers and that answering requests for electronic records (or, indeed, many requests by one person for paper records) could be excessively costly.

Though such arguments may have plausibility, in the end they are not sustainable. The *Access to Information Act* must serve both professional and amateur requesters. Electronic databases should not become electronic barriers to the employee looking for information to support a grievance or to the citizen worrying about pesticides. If databases are constructed with easy public access in mind, then electronic searches for information will be immeasurably more efficient -- and much less expensive -- than reviewing boxes of paper records page by page.

The contents of federal government databases are as fair game for access requesters as information in filing cabinets. Parliament had the prescience to put these words (section 4, paragraph 3) in the legislation: "any record requested under this Act that does not exist but can...be produced from a machine readable record under the control of a government institution using computer hardware and software and technical expertise normally used by the government institution shall be deemed to be a record under the control of the government institution."

But saying electronic records are covered by the Act and obtaining access -- ah, there's the rub.

The information commissioner will be monitoring the impact of the new technology, focussing on the way the government holds and makes information available. Properly done, electronic access offers an exciting new dynamic dimension to information sharing, even to democracy.

Some jurisdictions are already addressing the issues now clustered around the evocative term, "electronic democracy". New York's Committee on Open Government calls electronic democracy "an issue of the 90s". Alaska has already passed legislation bringing its access to information law into the computer age. Its legislation compels the government to provide online access to an electronic file or database. "Information" services and products are to be made available at a reasonable fee. These services include the "electronic manipulation" of records in order to tailor the data to a person's requests, or even, to develop a product that meets a person's request.

Canadian public service managers -- or ministerial chiefs of staff -- who think the *Access to Information Act* now creates problems for them might consider a trip to Alike!

Closer to home, the Canadian Legal Information Centre (CLIC) was so concerned about maintaining public access to electronically held government legal information it established a national task force to tackle the problem. CLIC has been watching with growing apprehension as governments convert

statutes, regulations, registry and judgment information into electronic data bases. The fear is that, by default, only the most wealthy law firms or individuals will be able to penetrate the electronic walls.

Professor Alan Westin of Columbia University, a pioneer advocate of privacy protection, recently turned his major professional interest to access to information issues. Last year he told a U.S. Congressional Committee that he foresaw the United States becoming a nation in which the financially and technologically well-endowed -- government, business, science and the media -- were the "Lords of the Information Age" because of their easy access to the great store of information in the federal government's electronic databases. The rest of the population, he said, would be "information peasants because they would be information ally disenfranchised".

Professor Westin warned that the disenfranchised, in particular small businesses and private sector volunteer associations, would find it increasingly difficult to locate and use the information paid for by their own tax money. They would be unfairly handicapped in serving their own interests, asserting their economic and political views and, even, in monitoring the operations of their government.

Making a start

If anyone has the specific responsibility of trying to prevent such disenfranchisement, it is the Information Commissioner. Thus, he has initiated a study of what other countries are doing to improve public access to electronic databases. This modest research project should offer an authoritative, current analysis of how other jurisdictions are bringing their access to information laws into the electronic information age.

The study will explore how the wonders of the new technologies can better serve access to government records. The Information Commissioner hopes to be able to tell Parliament in a coming report, whether practices or, even, laws should be changed so that Canadians will have easy access to the increasing amount of electronically held information in their government's databases.

While this research project will investigate practices in other countries, interesting initiatives closer to home are worth looking at more closely. British Columbia has made some of its databases -- property transfers, for example -- open to direct computer access by the public. The system is called "BC Online". ("Canada Online" would also have a catchy ring.)

Today's operational decisions will have an enormous impact on the quality of tomorrow's access. That is why it is so important that government's decision makers think of the imperatives of the *Access to Information Act* when databases are constructed. In the design of government database systems, consideration of the needs for public access to records should be given equal billing with the needs of the information collectors and immediate users.

Here are some questions that will have to be answered: What federal databases would be adaptable to direct access? Other than direct access, are there alternative effective means of making government-held electronic information more available to the public? What information is of general enough interest to justify going "online"? How much should the government charge for electronic information? Should the government offer the distribution of value-added features? Is there a role for information brokers?

Beginnings have been made. Treasury Board's new **Info Source** System is an important initiative in this area. The printed **Info Source** volumes are available at more than 7,200 locations in Canada. Free

access to the **Info Source** online database is being provided at a growing number of locations, planned to be some 1,800 in 1991-92.

While significant, the system is capable of improvement and extension. The Information Commissioner has undertaken work, in cooperation with Treasury Board and Communications Canada, to examine options for improvements in two particular respects. One set of options relates to a means of making it easier for users of **Info Source** to identify existing government held electronic information. A second set relates to means of improving subject access to both the printed volumes and the online database.

The purpose of Treasury Board's excellent policy document, "Management of Government Information Holdings", is cost-effective, coordinated information management to serve better government and public. Another government initiative, "Government Communications Policy" looks beyond the narrow legal requirements of the law and encourages the informal sharing of government generated information.

Beyond these initiatives, some persons in a few corners of government are talking about the issues. But so far they are talking mainly to each other and often in narrow terms of realizing the financial potential of government databases, rather than in terms of the *Access to Information Act*.

More daring (and ultimately much more rewarding) ventures in open government should be everyone's goal.

Complaints

This sampler from the year's 745 completed complaints makes no pretensions at being a statistically valid cross-section of cases investigated or an indicator of trends. Cases were chosen either for their intrinsic interest -- complainant's requests are ingenious and unpredictable -- or for the significance of issues being raised.

The complaints reveal more about the complexities of the access to information business than provide a predictable pattern to the Commissioner's decisions.

Before the individual cases, a brief word about the somewhat exotic terminology and statistical tables giving the broad picture of the year's case work.

Unlike in civil or criminal proceedings, the Information Commissioner mediates complaints -- a process which leads to findings of:

- "justified" (a legal right has been denied or the spirit of the Act offended);
- "not justified" (no breach of the Act or outside the Commissioner's mandate) or;
- "discontinued" (complaint withdrawn or abandoned).

In Table 2, "complaint category" describes the type of complaint. Most concern a government institution's refusal to disclose part or all of the records but the office also investigates complaints of delay, extension of the time to respond, fees, language of the records and shortcomings in the various supporting publications.

A complaint may seem relatively minor -- one page exempted out of several hundred -- or it may have been rectified immediately. In making his finding, however, the Commissioner determines whether the complainant's legal rights were respected. It is not for him to determine the importance (or frivolity) of a complaint, simply its validity.

Table 1

STATUS OF COMPLAINTS

(comparison of last and current fiscals)

April 1, 1990 to March 31, 1991

Pending from previous year	669
Opened during the year	534
Completed during the year	745
Pending at year-end	458

Table 2

COMPLAINT FINDINGS

April 1, 1990 to March 31, 1991

CATEGORY	Justified	Not Justified	Discon-tinued	TOTAL	%
Refusal to disclose	226	215	13	454	60.9
Delay (deemed refusal)	154	26	15	135	26.2
Time extension	11	23	4	37	5.0
Fees	4	16	2	22	2.9
Language	-	-	-	-	-
Publications	-	-	-	-	-
Miscellaneous	8	28	1	37	5.0
TOTAL	403	308	34	745	100%
100%	54.1	41.3	4.6		

Table 3

COMPLAINT FINDINGS
(By Government Institutions)

April 1, 1990 to March 31, 1991

GOVERNMENT INSTITUTIONS	JUSTIFIED	NOT JUSTIFIED	DISCON-TINUED	TOTAL
Agriculture Canada	2	7	0	9
Atlantic Canada Opportunities Agency	1	2	0	3
Auditor General, Office of	0	1	0	1
Bank of Canada	0	4	0	4
Canada Labour Relations Board	1	0	0	1
Canada Ports Corporation	1	1	0	2
Canada Mortgage and Housing Corporation	2	1	0	3
Canadian Human Rights Commission	0	1	0	1
Canadian International Dev. Agency	4	3	0	7
Cdn. Radio-Television and Tel. Commission	1	0	0	1
Canadian Trans. Acc. Inv. and Safety Board	3	3	0	6
Canadian Security Intelligence Service	21	8	0	29
Communications	5	2	0	7
Comptroller General, Office of the	0	1	0	1
Consumer and Corporate Affairs	0	3	1	4
Copyright Board	0	1	0	1
Correctional Service Canada	6	3	0	9
Defence Construction (1951) Limited	0	1	0	1
Employment and Immigration	4	9	0	13
Energy, Mines and Resources	2	2	0	4
Environment Canada	11	8	0	19
External Affairs	8	7	0	15
Federal Business Development Bank	2	0	0	2
Finance	20	2	4	26
Fisheries and Oceans	2	2	0	4
Health and Welfare	21	18	4	43
Immigration and Refugee Board	2	1	0	3
Indian Affairs and Northern Development	2	10	1	13

Table 3

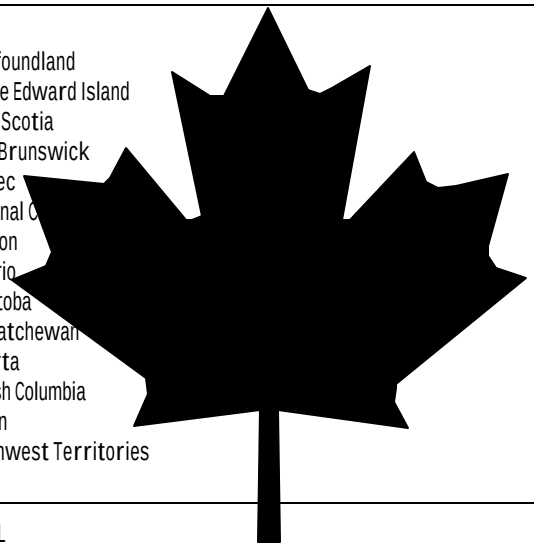
Government Institutions	JUSTIFIED	NOT JUSTIFIED	DISCON-TINUED	TOTAL
Industry, Science and Technology	2	3	0	5
International Development Research Centre	1	0	0	1
Investment Canada	1	3	0	4
Justice	15	13	0	28
Labour	1	1	0	2
National Archives of Canada	3	3	0	6
National Capital Commission	10	4	0	14
National Defence	54	25	0	79
National Parole Board	0	1	1	2
National Research Council	1	0	0	1
National Transportation Agency	1	0	0	1
Privatization and Regulatory Affairs, Office of	3	1	0	4
Privy Council Office	10	13	3	26
Public Service Commission	1	0	0	1
Public Works	5	4	1	10
Revenue Canada - Customs and Excise	7	2	0	9
Revenue Canada - Taxation	106	51	8	165
Royal Canadian Mint	1	0	0	1
Royal Canadian Mounted Police	5	15	1	21
Secretary of State	4	3	1	8
Solicitor General	7	1	0	8
Superintendent of Financial Inst's, Office of	1	1	0	2
Supply and Services	5	24	1	30
Transport Canada	36	37	7	80
Treasury Board Secretariat	0	1	0	1
Western Economic Diversification	2	1	0	3
Multiple	0	0	1	1
TOTAL	403	308	34	745

Table 4

GEOGRAPHIC DISTRIBUTION OF COMPLAINTS (by location of complainant)

Closed: April 1, 1990 to March 31, 1991

Outside Canada	1
Newfoundland	50
Prince Edward Island	3
Nova Scotia	7
New Brunswick	6
Quebec	129
National Capital Region	206
Ontario	116
Manitoba	12
Saskatchewan	3
Alberta	119
British Columbia	77
Yukon	0
Northwest Territories	16
TOTAL	745



Case Summaries

Polls

Inevitably, a poll case. (Britain had its poll tax; Canada its tax polls).

The Information Commissioner is not in business to tell a government department when to conduct polls and on what subjects. He makes no comment on the proliferation of polling as an instrument for devising policy. He is entitled to note, however, that it is passing bizarre that the public should be denied knowing what the public thinks when the public pays for collecting information about itself. He does warn those wishing to hold back poll results that they have a heavy burden in justifying delay on the grounds of not controlling the data or of injury to government interests.

A case history illustrates. Requests were made to the Department of Finance (a major player in the poll business but by no means the only one) for the results of several of its GST public opinion surveys. The requester complained to the Information Commissioner when he had not received a reply within a reasonable period of time.

Two reasons were offered for the delay. The Minister wrote: "The reports have not been received and are, therefore, unavailable for release. The results will be made publicly available at a later date when the department has dealt with all of the policy issues inherent in these surveys".

First, the matter of unavailability. The complaint investigation established that the Minister was referring to two surveys conducted seven and four months earlier. The investigator learned that the polling company had delivered a verbal briefing on the results to the Minister shortly after each poll was conducted. These briefings were illustrated by graphs and charts, though at that time no detailed analysis was provided. Supporting data and summaries of the briefings were later placed on departmental files.

Question: Are verbal briefings, followed by much later filings, a device to circumvent the legal obligation in the *Access to Information Act* of a timely response to requesters? This case is not the only one in which evidence exists that polling companies commonly use this formula.

The argument that the polling company, not the government institution, is in control of polling results is no excuse for delaying prompt responses to requests for the data. The Department of Supply and Services' standard contracting procedure calls for "client" control of poll information. Thus, the information belongs to the client, not the polling firm and no use can be made of the information without the consent of the client. Poll results at all stages are clearly "under the control of the government institution" -- those key words from the *Access to Information Act*.

There may sometimes be practical or operational necessity for making verbal reports of poll results to senior officials of client departments. But this practice should not become a means of ensuring that poll results are available only when they are no longer relevant.

Now to the department's second point, the injury argument. Finance claimed that the immediate release of the findings of its polls could injure the financial interests of the government -- a claim other departments have also used. In the case at hand, the Commissioner wrote that in his view "the poll itself

contained no information which could be injurious" since it merely recorded "existing attitudes of the Canadian public". He found against the department.

The Commissioner has supported almost every complaint of delay and exemptions dealing with requests for poll results. However, in many cases records have been released before a finding was made -- a release rate not nearly as good as it may look because often the action occurred after the information had lost much of its pertinence.

Guest lists

A requester wanted to know the names and countries of origin of guests invited by External Affairs to the opening of Canada's new Washington Embassy.

The department turned him down flat. External argued that the information was personal and should be exempted under section 19(1) of the Act. In addition to the personal privacy issue, External also claimed that releasing the guest list, in the words of section 15(1) of the Act, could "reasonably be expected to be injurious to the conduct of international affairs".

Though the Commissioner had doubts about the validity of the latter argument, he did not need to address it because, in his view, the privacy issue was paramount. On that matter, he said an essential difference should be made between those who attended the reception and those who did not.

He wrote:

> "Those who attended clearly expected to be seen. In accepting the invitation they tacitly waived any right to privacy. Indeed, it was a reasonable expectation that the event would receive extensive media coverage -- and it did. Persons in attendance could note and report upon their fellow guests -- some so reported. Guests could be observed entering the building. For these reasons, I cannot support any privacy claim made on behalf of those who were present at the opening.
>
> "But what of those who were on the guest list and chose not to attend? Here it seems to me that the privacy provision of section 19 is appropriately applied. These people did not ask to be invited. Indeed, the fact of receiving an invitation might be for some an embarrassment or, even, annoyance. It could indicate a relationship which either does not exist or if it did, one which an individual, for his or her own reasons, did not wish made publicly known."

The Commissioner found that External Affairs should release the names only (no addresses) of those who attended the Embassy's official opening. He also said that those names of Canadian federal officials who had been invited in their official capacities had been incorrectly exempted.

These decisions and arguments, however useful they may be as precedents, were of no help to the requester. External reported that it had no record of invitees who came and those who did not. In fact, some persons attended who were not even on its guest list. There was no record to release.

Did he qualify?

A researcher applied by letter and paid the fees in cash for records from Investment Canada. The

applicant then identified his agent but provided no telephone numbers. Since the department doubted the requester was present in Canada, it wrote the agent for assurance that the applicant qualified. The applicant then complained about the department's questioning of the right of access.

Although access rights were extended on April 13, 1989, to all individuals and corporations present in Canada, there remain limits on who may be given access. The Commissioner found the department acted in good faith when questioning the requester's qualifications.

Disappearing electrons

The Canadian International Development Agency (CIDA) was asked for a list of CIDA projects "cut as a result of the April 1989 federal budget and later cuts." The requester was unsatisfied with ClDA's response. He complained at not receiving a breakdown of program cuts, or their location, in what he characterized as a "sparse" response.

The case is a textbook example of the new challenges electronically-stored records pose to access rights.

A CIDA executive told the Information Commissioner that he understood the requester's frustration. There were no before-or-after records because budgeting records are held in an online computer system. Managers made budgetary changes by "re-profiling" computer programs: delaying project starting dates or extending the duration of a program from, say, three to four years. Thus annual spending commitments were reduced without necessarily cancelling or even reducing programs.

To receive the information he was seeking, the requester would need printouts before and after each "re-profiling". They did not exist. CIDA maintained that such print-outs are unfeasible because hundreds of its activities are frequently re-programmed. CIDA argued that the process is dynamic, not static.

The Commissioner found no evidence that CIDA had set out to thwart the *Access to Information Act*. The complaint, however, raised the question of what constitutes a record in the data processing world of disappearing electrons. As noted earlier in this report, if a government institution can produce a machine-readable record, it controls the information and therefore it is subject to an access request. But what if the capacity to produce the record is lost?

The Commissioner "somewhat of a techno-peasant", reported that he did not possess either the evidence or expertise to challenge ClDA's explanation. He remains concerned, however, about the dangers posed by technology and modern records management to an access regime. When should institutions be compelled to produce and keep records so they would be available for access requests? What is the Commissioner's role in policing electronic record-keeping? The answers remain elusive.

What's a record?

The question of when information is a record is not confined to electronically held information. The case of the "Meme implant" (a silicone breast prosthesis) has an access-to-information dimension. Without going into the turns and twists of an enormously complex matter, here are the essentials from the access-to-information point of view.

The Information Commissioner was asked to investigate allegations against the Department of Health and Welfare (H&W) of improper records destruction and altering of records dealing with the department's studies of the implant's safety. An investigator interviewed numerous employees from H&W and another institution. As well, he examined all records involving the Meme prosthesis.

It was clear that some records were ordered destroyed and others were altered. But was the destruction to prevent embarrassment or acceptable routine administrative practice?

The complaint itself was not supported on the narrow grounds that there was no evidence that the department had improperly treated records within the period covered by the access request. The department in fact did provide the complainant with internal correspondence relating directly to its handling of various stages of a staff doctor's report on the Meme device.

Nonetheless, the destruction of records concerned the Commissioner enough that he wrote the deputy minister: "Any destruction of records which is motivated by a desire to suppress an improper view or embarrassing information or to alter the developmental history of a matter is not, in my view, acceptable."

The Commissioner acknowledged that it is sometimes difficult to determine when a document ceases being a rough draft (which clearly need not be kept) and becomes a departmental record. He suggested that consultations among officials of the department, Treasury Board, Justice and the Commissioner's office would be useful to determine ground rules.

In reply, the deputy concurred with the Commissioner's view of what would constitute unacceptable records destruction. She went on, however, to make the following points:

> "It is standard office procedure to review draft scientific papers and reports before their publication and to request changes or further research when they are deemed to be inaccurate or incomplete. Such draft papers and reports as well as drafts of letters and memoranda are routinely destroyed often simply by recycling the paper, as to retain them on file would be a monumental task. Not only could the preservation of reports containing laboratory errors, poor judgments or interpretations, or indeed deliberate falsifications, be contrary to the public interest, Treasury Board requires public servants to scrutinize the vast quantity of paper that tends to accumulate, with a view to reducing it and thereby effecting economies in the use of office space and storage cabinets."

The deputy agreed that it is "sometimes difficult to determine when a record ceases to be a draft and should become a departmental record". She believed, however, that the scientists and managers in her department, as well as the majority of public servants, exercise their discretion in "a prudent and realistic manner".

The correspondence ended with the Commissioner being reassured that Health and Welfare respected the principles at issue but he was concerned that the concept of "standard office procedure" is open to abuse. He was particularly sensitive to documents which acquire status by revealing the full background leading up to a final decision or product. He acknowledged that setting down abstract principles in these matters is difficult. He asked that staff remember "on a case-by-case basis", the demands of the *Access to Information Act*.

As to the problem of accumulating too much paper, the Commissioner's experience in examining government files leads him to believe that the added burden of maintaining key drafts would be more

than offset by cutting out unnecessary duplication.

What is a manual?

The *Access to Information Act* requires each government department to set aside an area which the general public can use to "inspect any manuals used by employees of the institution in administering or carrying out programs or activities of the institution that affect the public."

The complainant asked the Department of Transport to let him see the Master Minimum Equipment List (MMEL) for a particular aircraft. This document is not produced by the government but is submitted to the Department of Transport by a third party. He was refused informal access and complained to the Commissioner that the department was violating the public's right to such a "manual".

At issue was whether the MMEL, and documents like it, were manuals as described in section 71 of the Act. The *Access to Information Act* does not define "manual" but Treasury Board guidelines describe a manual as "any set of directives, instructions, guidelines or procedures used by employees in administering or carrying out any operational programs or activities of a government institution."

The investigator studied transcripts of the proceedings of the Standing Committee on Justice and Legal Affairs which in 1981 debated the anticipated use of this provision. This showed clearly that the provision was intended to allow public access to any manuals government employees use to interpret regulations affecting the public.

Francis Fox, the Minister of Communications at that time, had said that "the idea is that if a government employee is using a manual to interpret legislation that affects a member of the public, that person will have access to the document on which the government employee is basing his interpretation." Mr. Fox also stated that it would be the first time that "public service manuals" would be made available to the public and it was important to let people know that a department "has manuals that include directives, policy statements, etc., and that such manuals do exist."

The Commissioner concluded that the manuals referred to in section 71 were those originating with departments and did not include those prepared and submitted by third parties. Since the MMEL was not a manual of the sort described in the Act, the complainant's rights had not been breached. The *Access to Information Act* has other specific provisions dealing with third party information.

Identifying confidences

Environment Canada responded to an application for its "Environmental Blueprint for the 90's" by excluding it entirely, claiming the document was a Cabinet confidence.

After filing a complaint with this office, the applicant wrote to the department to clarify his request. The applicant and the department then agreed that in response to a more precise request, more records would be released. The remaining records remained excluded under subsection 69(1).

The Commissioner agreed that the type of record, and the records of the department's consultations, supported the decision.

The Information Commissioner and the Clerk of the Privy Council have agreed that, when the

Commissioner is in doubt, he will be given written certification by the relevant minister or the clerk of the Privy Council that the documents are indeed confidences under section 69. As the Commissioner had no reason to be unsure in this case, he did not ask for such verification.

The complainant had also requested a list of all the section 69 documents involved. The Commissioner presented this request to the department but it declined. Institutions are under no obligation to provide such a list.

Isolating third parties

Two complaint investigations about Revenue Canada-Customs and Excise (C&E) responses to requests for information on imports provided interesting results.

One investigation concerned a request for a list of all Canadian importers of liquid malt extract from the United States from 1987 to 1989. C&E had refused the request, claiming that it was confidential commercial information exempt under paragraph 20(1)(b) of the Act.

An earlier investigation proved instructive to this case. In the earlier experience, despite written arguments from the Commissioner's office, C&E had insisted that its computerized list of importers of infrared lasers was confidential commercial information. The Commissioner decided to consult third parties who might be affected by such release.

As a result, the office sent letters to more than 300 importers identified on the Canada Customs List. Their responses quickly revealed that the tariff classification on which the list was based was too broad to isolate the specific item which interested the complainant. This had important implications, both for the direction of the ongoing investigation and the liquid malt extract case.

The investigator, examining the tariff classification on which the liquid malt extract list was based, found it contained imports other than the product which the complainant had specified. The Commissioner thus found the complaint not justified because the department did not have the record.

These investigations showed that unlike most consultations which involve very few third parties, requests for information about imports can involve hundreds.
Had consultations been practical in this investigation, third parties would probably have numbered in the thousands. It is now evident that Customs records may often not make possible the isolation and retrieval of specific imports information. Thus the failure of a third party to respond to the commissioner's consultations may not indicate that the addressee was an importer of the particular item and has conceded release. In fact he may know little about the product and could care less about disclosure. Given the large numbers involved in such requests about imports, this broad brush approach can obviously not be employed .

The department should examine future access requests to determine whether in fact it possesses the record requested. Certainly complaint investigators will be looking.

A final note: the department continues to consider this type of information exempt from release under paragraph 20(1)(b) of the Act. The Commissioner is inclined to contest that position, depending on the nature of the import and whether a proper record exists.

Were they public servants?

The first access complaint against the International Development Research Centre (IDRC) occurred after it denied an applicant the names of the governors who attended a board meeting in Bangkok, Thailand, in March 1990. The centre had given the applicant detailed expense accounts for the trip (minus some personal data) but withheld names because it considered them to be personal information.

The investigator examining the records found that the board members were officers of IDRC. Information about their position or functions (including money spent on work-related travel) is not "personal" under the *Access to Information Act* (or the *Privacy Act*). In addition, the names of these orders-in-council appointees were published in IDRC's annual report. IDRC resisted the request because it believed the appointees were not public servants within the meaning of section 3 of the *Privacy Act*.

IDRC asked for a legal opinion on the status of board members. After considering such opinion and further discussions with the investigator, IDRC released the names. The Commissioner considered the complaint justified and resolved.

Committees perform

Take heart all those who despair of government committees. Applicants wanted the "Rodal Report", commissioned by the Deschenes Commission in its investigation of war criminals who might have been admitted to Canada. The Privy Council Office released the report subject to a number of exemptions under subsections 13(1), 15(1), 16(1), 19(1) and 23(1), solicitor-client privilege.

The complaints cited both specific exemptions and their volume.

The complaints were investigated together with several others dealing with requests for records about alleged war criminals, particularly those concerning the admission and removal from Canada of Jacques deBernonville.

The Commissioner sent some 80 queries to the Privy Council Office about the exemptions and PCO reviewed the records in conjunction with the other departments having interest in the documents.

PCO found itself chairing a committee of PCO, RCMP, CSIS, CEIC, Solicitor General, Department of Justice and External Affairs Canada. To the surprise of just about everyone who is suspect of government committees, the end product was excellent. All the Commissioner's observations were dealt with and significant additional information was released.

Gander air crash

In this case, the Canadian Security Intelligence Service was asked for records from a Security Intelligence Review Committee (SIRC) inquiry about the 1985 Arrow Air crash in Gander, Newfoundland. Specifically, the requester asked for copies of all CSIS and SIRC correspondence, memos and files on the inquiry and all other records in CSIS files about the crash.

He complained that the released records were heavily "censored" and wanted the Commissioner's assurances that the exemptions were valid.

CSIS had invoked a number of exemptions, including:

- the information had been supplied in confidence by another government or international organization (subsection 13(1));
- release could harm international affairs or the defence of Canada (subsection 15(1));
- the information was obtained during a lawful investigation and release could reveal investigative techniques or harm law enforcement (subsection 16(1));
- some of the information was personal (subsection 19(1)); and
- some contained advice to government or ministers (paragraph 21(1) (a))

After an investigator examined all the records, the Commissioner's office recommended the release of more information. CSIS agreed and the Commissioner considered that the remainder had been properly exempted. The justified complaint was resolved through mediation.

Too late to complain

A request for records dealing with the granting of a foreign bank license to the Amex Bank of Canada was received at the Department of Finance January 20 1989. There was no subsequent exchange of correspondence between the requester or the department until July 27, 1990. At that time the department released 124 pages more of the 767 pages of records. Exemptions were claimed on the rest.

Now the extraordinary part. The requester was told she could take her complaint to the Commissioner. Yet, it was by now some six months after the expiration of the date by which she could legally do so. (The *Access to Information Act*, section 31, says a complaint must be made within one year from the time the request for a record is received). The situation, the Commissioner wrote to the complainant is as "bizarre and as unsatisfactory to me as to you".

This office pursued the question of whether the Information Commissioner had discretionary power to waive the one-year time limit. Unfortunately, the answer is -- he does not. Section 31 is absolute, standing in puzzling contrast to section 41 of the Act which does give the Federal Court jurisdiction to extend the time limit in applying for judicial review.

The Commissioner took this matter up with the Department of Finance with little success.

This complainant was deprived of her right because of the extreme length of time taken by the Department of Finance to respond to her request. She became the victim of the department's sloth. The best solution, and it is unsatisfactory, was to have the requester submit a new application. She did so, to expedite matters, and then withdrew her complaint -- perhaps to fight the battle another day.

The Commissioner recommends that the *Access to Information Act* be changed to prevent this loophole from being used, deliberately or not, as a way of avoiding complaints. Any time limit for making a complaint to the Commissioner should start running only after a requester receives a response from an institution, not from when a request for information is made.

Revised request works

A translator requested a list of bidders and the opportunities they had to bid on all translating jobs tendered by the Secretary of State from April 1 to 17, 1990. The department estimated that 22.5 hours would be necessary to search and prepare the information. This prompted the translator to complain to the Commissioner. A few days later, he sent the department a modified request. The Commissioner's investigator suggested that the complainant hold this complaint until the department responded to the revised request. He agreed. The revisions lead the department to releasing all of the requested information and the complaint was withdrawn.

Judicial appointments

An individual asked to examine records about the appointment of judges to the Supreme Courts of Canada and Ontario. The Department of Justice said that it had no such records and the applicant complained to the Commissioner.

The investigator confirmed that Justice in fact had no such records. If they did exist, they would probably be with the Commissioner for Federal Judicial Affairs where assessments are made on the qualifications of candidates for federal judicial appointments. The office, however, is independent of the Department of Justice and not subject to the *Access to Information Act*.

The Commissioner dismissed the complaint.

System response awkward

Here the applicant asked Transport Canada for Enforcement Management Information System (EMIS) reports from January 1987 to the present. These reports involve possible safety violations of Acts and Regulations by aircraft.

Transport Canada supplied the reports and charged a $100 fee. The applicant complained to the Commissioner that poor records management systems had caused him to pay too much.

Transport Canada had first assessed a $200 fee but reduced it because of a misunderstanding. This occurred when Transport Canada sent out the fee estimate but continued to process the request. The complainant had discussed the $200 estimate with departmental staff and thought Transport Canada had waived the fees. It had not. Because of this misunderstanding the department charged only $100.

The investigator found that the system was designed for a specific function with a limited ability to search and produce other types of reports. It could not automatically generate the data the complainant wanted. Thus Transport staff had to produce the report using both manual and computer processing. They began by using an ad hoc program to retrieve some of the data, then used that data to create summaries. Staff considered this more cost effective than editing the computer printouts.

The Commissioner concluded that the complaint was unjustified. Not only did the fees comply with the Act but Transport Canada had already reduced them by half and had not charged computer processing costs.

The complainant's charge was legitimate in that the system was poorly organized to respond to access requests. The department wished to redevelop the system, but lacked the necessary funds.

Computerized records

The applicant in this case sought the records of all access requests filed with National Defence (DND) and the agencies under its control from 1988 to the present.

He complained of excessive fees assessed for 18 minutes of computer time.

The investigation found that the records are summaries contained on a computerized database. The computer program is designed to provide reports in certain predetermined formats. Producing the records in other formats would require re-programming. DND agreed to provide the data in the format requested and so altered the program.

DND estimated the processing involved by running a similar program, timing it, and calculating the per-page cost and the overall charges.

The investigation confirmed that no other processing was being conducted when the example was run or when this request was processed. It also found that DND did not charge programming fees. Thus, DND's steps to assess and charge the fees were consistent with the *Access to Information Act*. The Commissioner found the complaint was not justified.

CAIR system

The applicant had asked for lists of access to information requests from the CAIR system maintained by Supply and Services Canada (DSS). The system is a network of microcomputers designed to coordinate departments' responses to access requests.

The applicant received the records but complained about the fees which he found inconsistent with earlier charges. He wondered whether diskettes would be cheaper than printouts and if charges would be lower using faster equipment.

The investigation showed that DSS operates CAIR on a system without an accounting package. DSS based the estimate of 11 minutes for this request on the computer time of similar previous runs. With no other programs running concurrently, it took the computer 11 minutes to process, plus four minutes to make the disk copy and more than one hour to print the 526 pages of the report.

The department is entitled to charge $16.50 per minute for the central processor and all locally attached devices. In this case, DSS charged only the estimated run time even though it was entitled to recover the added processing costs.

The investigation, involving both access and technical staff, found no inconsistent application of fees. It also confirmed the use of a more powerful system would take less time. Finally, as DSS did not charge for the printout, a diskette would not have reduced the fees.

The Commissioner found the complaint was not justified.

Federal Court Review

Two levels of independent review provide *Access to Information Act* insurance that government institutions disclose records properly. The first level is the Information Commissioner and the second is the Federal Court of Canada.

The first level gives applicants the opportunity to ask the Information Commissioner to investigate their complaints that the government has not responded properly to their applications for information. The second level provides the ground rules for asking the Federal Court to review two types of decisions: government proposals to disclose third-party information, and -- once the Commissioner has completed his investigation -- complaints about improper denial of access.

Third-party applications

Government institutions proposing to disclose information affecting the interests of a third party must first notify the party, giving it an opportunity to demonstrate why its information should not be released.

If the third party's representations do not persuade the institution to exempt the material, it may ask the Federal Court to review the decision and order the department not to disclose the information. When such a request is made, the third parties must prove to the Court that the information should not be disclosed because it qualifies as one of the mandatory exemptions in subsection 20(1).

This kind of third-party action represented more than two-thirds of the 56 applications for Federal Court review filed this year.

None of the 41 third-party applications have been argued before the Courts. Only three have been settled and withdrawn. Thus, virtually all the third party applications filed during the past year still sit with the Court waiting to be heard.

Add to this the 51 cases pending from previous years (two of which date back to 1985) and the total is 89 applications still awaiting a hearing. Third-party court applications delay disclosures, on average, two and a half years and less than two per cent have been successful.

Most applications to block disclosure are in fact never heard -- they're settled and withdrawn. Of the 194 third-party cases filed since 1983, 37 per cent have been settled. Some third-parties seem to use the right to go to Court not only to prevent disclosure but as a tactic to delay access. Others may use the judicial review procedure to gain time to work out a settlement: 16 cases were settled within three months of filing.

Third-party litigation: the commissioner's role

The Commissioner has no formal role in this third-party process. His office is rarely involved so he can only presume that settlements usually lead to institutions withholding at least some of the information which was to be disclosed.

In spite of this, the office continues to monitor all third-party applications. It will get involved, however, when the Court invites it to do so or in cases to which it can make a meaningful contribution.

Many third parties, unfamiliar with the Act, take an excessive amount of time to assemble the facts to prove their entitlement to an exemption. Because of this, the Commissioner proposes to work with government and third parties during the coming year to find a way to reduce both the number of third-party applications and the delays they cause.

Litigation: the commissioner's last resort

When an institution refuses to release information requested under the Act, the applicant may ask for an independent review -- first by the Information Commissioner and then, if necessary, by the Federal Court.

After receiving a request for review, the office first conducts a thorough investigation to determine the relevant facts and to assess whether the government applied the proper exemptions in refusing disclosure. The Commissioner then seeks to mediate a resolution -- his primary goal. If this is unsuccessful and the applicant continues to believe that the information should be disclosed, he or she may apply for a Court review.

The Information Commissioner too may apply for judicial review if he is unsatisfied with the department's response. Since the Act took effect, there have been 287 requests for court review, 46 by applicants and 47 by the Information Commissioner.

The office has made a concerted effort during this past year to resolve more complaints by persuasion, thus reducing its own applications for judicial interpretation of the Act. As a result, the office has launched only two new review applications, none since the appointment of a new Commissioner.

During the last nine months of the reporting year staff undertook to mediate all outstanding court cases. As a result, nine of the Commissioner's 13 outstanding cases were resolved; six were settled and the remainder withdrawn . While hindsight vision is always 20-20, perhaps these statistics demonstrate that with a will on both sides to find a solution, negotiations can reduce the number of court applications.

Court review will be necessary when there is a need for interpretation of the Act or faced with an intractable institution which the Commissioner believes is flouting the law. The Commissioner intends, however, to ask for review only after making every reasonable effort to resolve a dispute. Even then, he will continue to mediate as long as there is some hope of settlement.

New court rules needed

Although the *Access to Information Act* provides for the Federal Court to make special rules to hear access appeals, it has not done so. Existing court methods make no allowances for the situations which arise in access applications. The result has been lengthier and more costly proceedings.

In one case Mr. Justice Décary wrote: "Things would have been made easier for practitioners had the Court adopted the 'special rules' it was directed to make by section 45 of the Act." Mr. Justice Décary was grappling with the issue of whether the Court had jurisdiction to grant the request, by a lawyer representing the applicant, for access on a confidential basis to the very records at issue in the

application (see page 40).

It may be helpful to the Court to identify here areas where special rules are needed and should be designed. They are rules which:

- minimize the delays and costs of obtaining a court ruling;
- ensure all relevant information and interested parties are before the Court; and
- respect the integrity of both the records at issue and other confidential information

Formulating particular court rules is not novel or complex. The Federal Court already allows special rules in similar situations as summary applications under the *Trade Marks Act*. After some eight year's experience, it should now be possible to draft such rules for the *Access to Information Act*.

Decision highlights

During 1990-91, the Trial Division of the Federal Court handed down six *Access to Information Act* decisions. Of these, five were filed by complainants and one by the Commissioner. While most decisions concerned procedural matters, there were some lessons to be learned -- particularly for requesters wanting to take their own review applications to court.

Court costs

In four of the applications the Court ruled on awarding costs.

In the first case, *Creighton v. Office of the Superintendent of Financial Institutions* (T-2048-89), the question was whether the requested records existed at all. The Court dismissed the application once it was satisfied that the records did not exist. It did not require Mr. Creighton to pay court costs, however, because the judge thought that the department had mistreated him while it processed the application.

Similarly, in an application by *Mr. X against the Department of National Defence* (T-1112-89), the Court awarded legal costs to Mr. X because DND took so long to process the request and "did not even extend to the applicant the courtesy of an explanation" for the delay.

The outcome was different when Mr. X brought a similar application against DND a few months later (T-2176-89). In this case, the Court awarded $200 in costs to the government. According to the Court, the applicant had unnecessarily occupied the time and resources of the Court and the government because DND had given him the records two months before the Court application was filed.

Mr. Justice Strayer wrote: "I regard this application as frivolous and vexatious because its futility should have been amply evident to the applicant. Having already failed in a previous application against the same respondent to obtain an order from the Court even in a stronger case, I cannot imagine how the applicant could reasonably believe that he could come back and obtain an order in a case where there had been no failure to disclose during the extended period".

In another case the Court decided that an applicant acting as his own counsel during a court review is not entitled to legal fees. This decision came out of *Rubin v. Attorney General of Canada, Raymond P. Guenette, J.F. Cousineau, and Canada Mortgage and Housing Corporation* (T2581 -89). Thus, it appears that applicants who take their own cases to court will be able to recover taxable out-of-pocket expenses but nothing for their time and effort.

It is interesting that none of these cases mentioned subsection 53(2). This provision enables the Court to award costs to the applicant -- even if the review is unsuccessful -- if the application has raised an important new principle concerning the Act. Perhaps applicants should consider using this provision in the future.

Delays

Two Federal Court decisions made this year will have a significant effect on the Act.

The first, by Mr. Justice Muldoon, discussed earlier in this report, concerned three applications by the Information Commissioner against the Minister of External Affairs (T-1042-86, T-1090-86 and T-1200-86) .

The cases involved three separate requests for documents about the free trade agreement. External Affairs received the requests at different times but extended its response time for each request 120 days past the 30 days allowed and then processed them together.

In his decision, Mr. Justice Muldoon said that one of the main purposes of the Act is to change public servants' attitudes and to oblige them to give out information, subject to the limitations of the Act -- even if it imposes extra work.

His order sets out a number of rules to guide departments:

- Departments must be able to substantiate each extension based upon the requirements of each request. It was a breach of the Act to take the same 120-day extension for each of the three requests.

- It was not wrong for the department to process all the records at the same time; it was wrong to withhold records which were ready. Thus, departments should disclose records as they become available.

- A department must justify a time extension by providing the Commissioner's office with cogent genuine reasons which will justify both the extension and its length.

A few months later, in a related decision *X v. the Minister of National Defence* (T2176-89), Mr. Justice Strayer appeared to differ with Mr. Justice Muldoon's view concerning the scope of judicial review envisaged by the Act.

He said, "unless there is a genuine and continuing refusal to disclose and thus an occasion for making an order for disclosure or its equivalent, no remedy can be granted by this Court." Accordingly, he decided that he had no jurisdiction because the department had not refused to release the records. They had, in fact, already been disclosed by the time Mr. X applied for the review.

The Commissioner agrees that generally there is no right of review once all the requested records have been disclosed. Mr. Justice Strayer, however, went further. He wrote that, in his view, a court has no jurisdiction to review a time extension, regardless of its length and whether or not it was reasonable.

The Commissioner can cite at least three situations where the Federal Court appears to have jurisdiction to review whether an institution was justified in extending the 30-day time limit.

They are:

1. When an institution is not justified in extending the statutory 30-day time limit because it cannot meet the conditions set out in subsection 9(1)(a) or (b). In this case, since there is no basis for an extension, the institution would be deemed to have refused the records once the 30 days expired. With disclosure "deemed" to have been refused, a right of Court review exists.

2. When an institution extends the time limit unreasonably -- by taking, for example, a 270-day extension when the facts support only 60 days. Once the 60 days expire and the records have not been disclosed, the records are considered refused and there is a corresponding right to review.

3. When the institution is not justified in extending the time limit because the Commissioner determined that the institution had no grounds to justify notifying a third party (subsection 20(1)). Without proper justification for extending the time, the records would be deemed refused once the 30 days expired. At that point the complainant has a right to judicial review.

The Commissioner expects government institutions to seek extensions only when justified by the Act and, even then, only defensible extensions. If the Commissioner concludes that a delay or time extension infringes the Act, and he has been unable to mediate a solution, he may yet decide to take the complaint to court.

Counsel may see disputed records

In *Consumer and Corporate Affairs and Iain Hunter* (A243-90), the Federal Court of Appeal decided that, in general, an applicant's legal counsel may examine the exempted records to prepare for a court hearing -- although not in the case at issue. Consumer and Corporate Affairs Canada had appealed an earlier decision by Madame Justice Reed that an applicant's lawyer should be allowed to examine the material on an undertaking that he or she not reveal the contents to anyone, including the client.

The appeal stemmed from a request by Iain Hunter, a reporter for the Ottawa Citizen, for all records filed by the prime minister and cabinet ministers under the conflict of interest guidelines. The department had exempted all the material claiming it was "personal information" (subsection 19(1)). The Commissioner supported the exemption noting, however, that there might be cases in which the public interest might override privacy (section 8(2)(m) of the *Privacy Act*) . Mr. Hunter asked for a court review.

The three appeal judges disagreed with the earlier ruling but for different reasons. In a minority opinion, Mr. Justice Pratte said that section 47 of the Act does not permit disclosure even to counsel.

Mr. Justice Décary and Mr. Justice Mahoney disagreed. They held that section 47 allows the Court

to grant access to counsel in order to argue for disclosure, providing that he or she undertakes not to disclose the information.

The Court ruled that it was not appropriate to order the records disclosed to counsel because "in a case such as this one, where it is the nature of the information...rather than its specific content which is at issue...counsel need not see the actual information at issue in order to prepare adequately for the application".

The case illustrates well the minimum standard of disclosure since the department had provided a copy of the code and described extensively the kind of information it required ministers to provide. This was sufficient for counsel to argue the application.

The opinion should have little impact on the Commissioner's office. The majority opinion seems to support the proposition that one should look for the interpretation most in keeping with the purpose and principles of the Act. The case also points out the continuing need for the Court to establish some procedural rules for reviewing access complaints.

Commercial information

The Court agreed with the decision of the Minister of External Affairs not to disclose to a requesting MP the amount in kilograms of the largest single import cheese quota allocated to an individual or company in 1985.

The Information Commissioner brought the case (T-895-88) against External Affairs after the department rejected the request because the company supplied the information to the government in confidence. The department believed its disclosure could harm the company's financial or competitive position (paragraphs 20(1)(b) and (c) of the Act).

The Commissioner agreed that the information was commercial but did not believe the department had substantiated its claim that the company had supplied the information in confidence or that its disclosure would be harmful. The Commissioner also argued that the information was provided to obtain a substantial financial benefit -- a cheese import quota. Since the public interest did not require the government to treat the information confidentially in order to preserve a flow of information between itself and the company, the Commissioner did not consider the information confidential.

Mr. Justice Denault concluded that the exemptions were proper because importers had supplied the government market information on their cheese imports in confidence in 1975. From this information, the government calculated all initial quotas. Though the applicant wanted the 1985 quota, the information was essentially the same. The Court agreed it had been supplied in confidence and was a proper exemption under paragraph 20(1)(b).

Mr. Justice Denault then considered the harm that disclosure could cause. He applied the test established by the Federal Court of Appeal judgment in *Canada Packers Inc. v. the Minister of Agriculture* [1989] 1 F.C. p.47 -- that is, whether there is a reasonable expectation of probable harm. Determining what constitutes a "reasonable" expectation of "probable" harm is the crux of the issue and invariably prompts serious disagreement -- as it did in this case.

The Court concluded that in this case the third party had met the test. Mr. Justice Denault said: "Given the nature of the information sought, its potential uses, and the great confidence with which it has been

guarded at all times, I find that the respondents have established that a reasonable expectation of probable harm exists regarding its disclosure".

The Court was not satisfied that the company had substantiated its claim that disclosure would interfere with contractual negotiations (paragraph 20(1)(d)). Mr. Justice Denault said that "while some evidence was tendered...of the possible effect of disclosure on international contracts generally, and while hypothetical problems concerning foreign supplies and local customers were raised in the third party's affidavit, these are not sufficient to establish a reasonable expectation that any particular contract or negotiations will be obstructed by disclosure. Consequently the grounds for exemption under paragraph 20(1)(d) have not been demonstrated. "

In court this year

During the past year, the Information Commissioner filed two applications for judicial review and participated in 17 cases already before the Court.

The cases are listed by filing date, beginning with those which have been closed. Here is a summary of the issues involved in each case and the status. Greater detail can be obtained from the office.

Closed cases

Information Commissioner v. Solicitor General (Federal Court No. T-2783-86, Filed December 23, 1986; Federal Court Appeal No. A679-88)

The dispute in this case concerned the Solicitor General's decision to remove "personal information" from a report about the food services unit in a penitentiary. The primary issue at the hearing was whether the information dealt with an employee's position or functions (and therefore not personal) or whether it concerned the individual in the position and so was personal.

A secondary element in the case, but the primary one in the Appeal, was interpreting the "reasonableness" test in section 25. This provision obliges the department to disclose from otherwise exempt records "any part of the record that...can reasonably be severed". In simple terms that means disclosing everything that is not exempt and that can be separated from the exempt information.

After considering the case, the Commissioner concluded that it is not reasonable to require an institution to sever information from a record if the result is a series of disjointed words or phrases with no content, context or meaning. A valid section 25 severance should provide the applicant with information which responds in any way to the request but, at the same time, protects the confidentiality of the exempt portions of the record.

The Commissioner concluded that this approach was consistent with that taken by Associate Chief Justice Jerome in the Trial Division and so discontinued the Appeal.

Information Commissioner v. Secretary of State for External Affairs (Federal Court No. T-165-88, Filed February4, 1988)

The complainant was refused copies of correspondence between External Affairs and the office of the Access to Information Commissioner exchanged during the investigation of another complaint made by

the same individual. The department withheld the material, citing section 35 of the Act which requires investigations to be conducted in private.

In the opinion of the former Assistant Commissioner, Bruce Mann, and the complainant, section 35 is not an exempting provision and may not be relied upon to withhold records requested under the Act.

In the course of his review of this previously outstanding court case, the present Commissioner came to a different conclusion. In his view, section 35 is intended to give all parties the assurance that, unless the Commissioner determines otherwise, information provided to the Commissioner's office in the course of an investigation will be kept confidential.

Without such assurance, openness and candor would be discouraged, seriously hampering the effectiveness of investigations.

Subsection 35(2) is explicit: no one is entitled "to have access to or comment on representations made to the Commissioner." Correspondence between the Commissioner's office and institutions may often contain a mix of purely factual material and "representations" -- a term not defined in the legislation.

Since subsection 35(2) specifically says that there is no right of access to representations, the Commissioner concluded that an institution must refuse to disclose records which contain representations made during an investigation. Any other conclusion would have the effect of conferring on departments the discretion which subsection 35(2) gives to the Commissioner.

In the case at hand, therefore, the institution had the authority, indeed the responsibility, to withhold such information, subject, of course, to the duty to sever records and disclose any non-exempt information.

During the course of the investigation, the department also claimed that the records could have been exempted in their entirety under paragraph 16(1)(c) because disclosure would be injurious to the Commissioner's ongoing investigation . The present commissioner agreed that to the extent some portions of the records did not contain representations they would be properly exempted under that provision. He directed that this case be withdrawn.

ICI Americas Inc. et al. v. The Queen et al. (Federal Court No.T-1116-88, Filed November 10, 1988 [Information Commissioner Intervenant])

This case arose after Agriculture Canada refused to disclose a study it had received from the company about neurotoxicity in pesticides.

There were two issues:

- Did the report contain confidential, scientific or technical information?

- Would disclosure of the report be in the public interest because public health concerns clearly outweighed any harm to a third party's financial or competitive position or any interference with its contractual or other negotiations?

The case was discontinued when the third party consented to the release of the requested study.

Information Commissioner v. Minister of Agriculture (Federal Court No. T- 1885-88, Filed October 4, 1988)

The Commissioner withdrew this case after the department provided evidence in its Court application to support its contention that the disclosure requested could damage the conduct of international affairs. The case concerned inspection reports on conditions in certain European meat packing plants. The case was settled on the basis of the department's agreement to sever and release portions of the reports which would not harm Canada's relations with other countries.

Information Commissioner v. Minister of State (Privatization and Regulatory Affairs) (Federal Court No. T-2036-89, Filed October 5, 1989)

The complainant had sought records about the possible privatization of Petro Canada. The main issue in the case was whether the department had severed and disclosed all of the information not covered by exemptions. The Commissioner withdrew the case after the department agreed to disclose additional information.

Information Commissioner v. Minister of Employment and Immigration (Federal Court No. T2295-89, Filed October 27, 1989)

The applicant in this case wanted information from Employment and Immigration files about six named individuals. The matter went to court over whether the department had severed and disclosed all non-personal information. The case was settled after the department agreed to disclose additional information which the Commissioner considered not to be personal or, if personal, available publicly elsewhere.

Information Commissioner v. National Capital Commission et al. (Federal Court No. T-2737-89, Filed November 29, 1989)

This case concerned a new classification standard which the NCC exempted under 21(1)(d) because it contained information about personnel management plans not yet put into operation. The Commissioner disagreed because the classification standard had been approved by Treasury Board and partially implemented. The Commissioner withdrew the request when the complainant confirmed he was no longer interested in the disputed records.

Information Commissioner v. Solicitor General of Canada (Federal Court No. T-2766-89, Filed December 5, 1989)

Described in the 1989-90 Annual Report (p.64), this case was initiated when the Commissioner believed the department had exempted non-personal information. The case was settled when the department agreed to sever and disclose the disputed information.

Information Commissioner v. Minister of Employment and Immigration (Federal Court No. T2844-89, Filed December 8, 1989)

Also described in the 1989-90 Annual Report (p.65), this case was withdrawn by the Commissioner after the department released records it had previously exempted. The Commissioner had originally asked the Court to review the information the department exempted because it had not substantiated that disclosure would harm the conduct of international affairs.

The Information Commissioner v. Department of Fisheries and Oceans (Federal Court No. T-674-90, Filed March 14, 1990)

In this case also, the department's agreement to release the record meant that the Commissioner could withdraw the court application. At issue was whether the requested records, a consultant's report, had been prepared primarily for expected litigation and thus protected by solicitor-client privilege. The case was described in the 1989-90 Annual Report (p.66).

Open cases

Mary Bland v. National Capital Commission (Federal Court No. T-2300-86) Filed October 21, 1986

The primary issue in this case concerns the National Capital Commission's (NCC) refusal to disclose the names and the rents paid by its residential tenants in 1984. The NCC exempted the information considering it to be personal. The case was heard in May 1990 and the parties, including both the Information and Privacy Commissioners who intervened, await the Court's decision.

Action on these cases is continuing.

Vienneau v Solicitor General of Canada (Federal Court No. T-842-87, Federal Court Appeal No. A-346-88)

Kealey v. Solicitor General of Canada (Federal Court No. T-1106-87, Federal Court Appeal No. A-347-88)

There has been no decision on the Commissioner's appeal of an earlier decision by the Trial Division. It had concluded that the Act does not oblige government institutions to specify which provisions have been used for each exemption claimed by the department. Even though the Court rejected the Commissioner's earlier application, it observed that providing provision numbers next to each deletion was highly commendable and in keeping with the basic purpose of the Act. The appeal is pending.

Information Commissioner v. Minister of National Revenue (Federal Court No. T-1034-90)

The applicant in this case had asked for background records concerning two specific Income Tax Interpretation Bulletins. Some records, containing information subject to solicitor-client privilege, were withheld.

Two issues are at stake here.

- Has the department a duty to determine if there is information in the record which is not subject to solicitor-client privilege and which can be severed and disclosed?

- Must the institution decide, case by case, whether to exempt even when the record contains information subject to solicitor-client privilege?

The case will proceed if attempts at mediation by the Commissioner prove unsuccessful.

Information Commissioner v. Minister of Indian and Northern Affairs (Federal Court No. T-1471-90)

The complainant had asked to see a report about the social, political and legal situation at the Kanesetake (Oka) Mohawk Reserve. The report had been prepared by a lawyer the department retained for that specific purpose. The department exempted the report, claiming solicitor-client privilege, even though it had given the complainant a similar report on the subject that had been prepared by an individual who was not a lawyer.

The Commissioner's investigation revealed that most of the report was factual and did not contain legal advice that would be protected by solicitor client privilege. The Commissioner recommended the department reexamine the report, identify those portions to which solicitor-client privilege applied and disclose the remainder. The department stood by its blanket exemption.

At issue is whether the solicitor-client exemption applies to the report and, if so, whether there are portions not warranting protection and which could be disclosed. The parties are continuing attempts to resolve the issues before a court hearing is held.

Public Affairs

The Commissioner and his staff continued during the year to speak to government agencies, media and the public about freedom of information and the Commissioner's role.

Retiring Commissioner Inger Hansen convened a first international conference for freedom of information ombudsmen. The conference examined such topics as the independent status of ombudsmen, competing pressures of freedom of information and privacy protection and procedural and statutory protection of trade secrets. Delegates to the conference were from Australia, Denmark, Finland, France and New Zealand as well as provincial and state officials from Connecticut, New York, Manitoba, New Brunswick, Ontario and Quebec.

Among the other audiences addressed by access to information representatives during the year were the International Bar Association, the Canadian Ombudsmen Conference, the Canadian Public Relations Society, Canadian Press, the Conference of Canadian Press Councils, the Council on Governmental Ethics Laws, access to information coordinators and various university classes.

The *Access to Information Act* should be itself accessible and, as much as any piece of legislation can be, user-friendly. Thus the office produced a long-awaited new consolidation of the *Access to Information Act*. The publication includes an index, schedules I and II and related legal provisions from other statutes. Copies are available free from the office.

Staff handled 393 requests for various information materials.

Inquiries

The Commissioner's staff responded to 1,098 inquiries during the year, most of them over the telephone.

Frequent subjects of inquiry were: the goods and services tax (access to information charges are exempt); environmental issues, such as the safety and long-term effects of pesticides; genealogical information and military records.

While the office has fine-tuned its listings in the blue page (government) listings of city phone directories to explain its mandate, it continues to lab our under the fallout of a somewhat ambiguous title. Thus, the office is often the target for calls from individuals who have no idea where to turn for help -- particularly calls from those who live beyond the Ottawa/Hull area.

The toll-free line is a life raft for anyone in a community with few federal services. As a result, receptionists referred more than 5,500 unrelated calls to Reference Canada during the year. This represents a reduction of 2,500 unrelated calls in the past two years, leaving more time for staff to help callers with questions about the *Access to Information Ac*t (and reduces the office's phone bill).

Corporate Management

Corporate Management provides both the Information and Privacy Commissioners with financial, personnel, administrative, informatics and library services.

Finance
The Offices' total resources for the 1990-91 fiscal year were $6,372,000 and 78 person-years, an increase of $567,905 and three person-years over 1989-90. Personnel costs of $4,897,442 and professional and special services expenditures of $577,300 accounted for more than 87 per cent of the total. The remaining $852,060 covered all other expenses.

The following are the Offices' expenditures for the period April 1, 1990 to March 31, 1991*

	Information	Privacy	Corporate Management	Total
Salaries	1,685,327	1,856,590	652,525	4,194,442
Employee Benefit Plan Contributions	288,230	323,380	91,390	703,000
Transportation and Communication	38,141	114,167	123,309	275,617
Information	84,446	58,546	5,549	148,541
Professional and Special Services	411,801	130,150	35,349	577.300
Rentals	3,952	2,2214	11,413	17,579
Purchased Repair and Maintenance	14,628	3,919	9,676	28,223
Utilities, Materials And Supplies	9,847	14,978	30,655	55,480
Acquisition of Machinery and Equipment	176,236	51,508	85,672	31,204
Other Payments	6,145	3,475	3,584	13,204
Total	2,718,753	2,558,927	1049,122	6,326,802

***** Expenditure Figures do not incorporate final year-end adjustments reflected in the Offices' 1990-91 Public Accounts.

Personnel

An increase of three person-years and a change of both the Privacy and the Information Commissioners contributed to an active personnel program. There were 45 staffing actions, including outside recruitment, promotions, the hiring of term employees and some reclassification.

Administration

New space was fitted-up for occupancy in the fall of 1990 and some progress was achieved in the records management area, particularly in the scheduling of administrative records.

Informatics

A new information technology was introduced to the organization. Three studies were undertaken concerning case management systems, additional office automation and networking in a secure environment. These studies will be completed in 1991-92 and will provide the necessary information to form a long-term information technology plan.

Library

The library provides services to the Information and the Privacy Commissioners. It is a resource centre for both the Information and Privacy staffs which is also open to the public.

A total of 436 books, periodicals, and annual reports were acquired through the Government Depository Services program. There were 835 items loaned and 847 reference questions answered. The automation of library functions was completed this year.

Organization Chart